Supreme Court, U.S.
FILED

No. 09-753 DEC 23 2009

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In The

Supreme Court of the United States

ROBERT McGOWAN,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DENNIS RIORDAN*
**Counsel of Record*
RIORDAN & HORGAN
523 Octavia Street
San Francisco, California 94102
(414) 431-3471

RUSSELL J. COLE
PAUL R. DEPASQUALE
DEPASQUALE & COLE
523 West Sixth Street, Suite 601
Los Angeles, California 90014
(213) 629-3550

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May the Ninth Circuit Court of Appeals, *sua sponte*, order the recusal of U.S. District Judge Manuel Real upon remand for sentencing in this criminal case, in derogation of the standards set in *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), because, during the hearing at which he granted the defendants' motions for judgment of acquittal, Judge Real expressed his opinion, formed after presiding at the jury trial below, that the government's case, "was at best an assault and battery, which should have been prosecuted by the state court[.]?"

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OPINION BELOW

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STATEMENT OF JURISDICTION

On September 2, 2009, the Court of Appeals for the Ninth Circuit issued its Mandate, giving effect to that Court's July 1, 2009, unpublished Memorandum decision, No. 07-50552, by which the Court of Appeals overturned the District Court's granting of Defendant Robert McGowan motion for acquittal under Rule 29 of the *Federal Rules of Criminal Procedure*.

On August 25, 2009, the Court of Appeals issued an Order informing the parties that the appellate panel had voted to deny McGowan's Petition for Rehearing, and that no circuit judge had requested a vote on the Petition for Rehearing En Banc. On November 23, 2009, this Court granted to McGowan an extension of time to file the within Petition for Writ of Certiorari until December 23, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

The undersigned counsel state that the notification required by Rule 29.4 of this Court's rules has been made by service of a copy of this Petition on the Solicitor General of the United States.

STATUTES INVOLVED

28 U.S.C. § 2106 states:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 25 of the Federal Rules of Criminal Procedure states:

> "(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:
>
> (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and
>
> (2) the judge completing the trial certifies familiarity with the trial record.
>
> (b) After a Verdict of Finding of Guilt.
>
> (1) In General. After a verdict or finding of guilt, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(2) Granting a New Trial. The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason."

STATEMENT OF THE CASE

On May 9, 2002, a Sergeant of the California Department of Corrections was attacked and beaten by inmates at the California Institution for Men in Chino, California. Later that day, inmates who were suspected of being involved in that assault were transported by van to the Administrative Segregation unit. Defendant Robert McGowan was one of half a dozen Correctional Officers who were tasked with meeting that van and escorting the inmates inside that facility.

The handling of the inmates upon arrival at the Administrative Segregation unit gave rise to this litigation. Count one of the first superseding indictment alleged a conspiracy to obstruct justice, in violation of 18 U.S.C. § 371 and § 1503, carried out by McGowan, the other two named defendants (Correctional Officer Flores and Correctional Sergeant Ramos) and other, un-indicted co-conspirators. Counts two and three charged McGowan with violations of

18 U.S.C. § 242, for assault under color of law resulting in the deprivation of the right to be free from cruel and unusual punishment.

The jury found all three defendants guilty of the conspiracy to obstruct justice. District Court Judge Manuel Real granted defense motions for judgment of acquittal as to all three defendants on count one. The government initially appealed this ruling, but abandoned such appeals prior to briefing in the Ninth Circuit.

The jury found McGowan guilty on counts two and three, and Judge Real likewise granted him a judgment of acquittal as to these charges. However, the Court of Appeals reversed that judgment of acquittal as to count two and three.

In remanding the case to the District Court, the Court of Appeals took it upon itself, *sua sponte*, to order that the case be assigned to a different district court judge for sentencing. In its July 17, 2009, Memorandum, the Ninth Circuit holds: "The district judge may have difficulty putting his previously expressed views aside, and remanding to a different district judge for sentencing would entail little duplication of labor."

Apparently, this finding was based upon Judge Real's handing of the motions for judgment of acquittal. As explained in the Memorandum:

> "In granting the motion to acquit, the district judge noted no problems with the

> identity of the attackers or with the evidence. Instead, the judge said, 'it was at best an assault and battery, which should have been prosecuted by the state court.' But the choice of whether and how to charge a crime belongs to the executive, not the judiciary."

This case has been re-assigned to U.S. District Court Judge Otis D. Wright, II, for sentencing, which is scheduled for February 1, 2010. Defendant McGowan remains free pending further proceedings upon terms imposed by Judge Wright.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The recusal of the trial judge, Manuel Real, by the Court of Appeals upon remand pursuant to 28 U.S.C. § 2106, *sua sponte*, would not be allowed under this Court's decisions regarding the standard for removal of a trial judge under 28 U.S.C. §§ 144 and 455, and, as a result, the Court of Appeals' decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, and otherwise is in conflict with decisions or other Courts of Appeals on the same issue.

The Recusal of Judge Real by the Court of Appeals should be Overruled under the Standard of *Liteky v. United States*

In *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), this Court considered the appropriate standard to apply when considering whether a trial judge should be replaced because the judge's impartiality might reasonably be questioned, whether the question is raised by a litigant (pursuant to 28 U.S.C. § 144) or by the trial judge him-or-herself (pursuant to 28 U.S.C. § 455). Specifically, the Court in *Liteky* considered, and refined, the long-standing principle that alleged bias or prejudice, to be disqualifying of a trial judge, must stem from "an extrajudicial source," as set forth in *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

The *Liteky* opinion has been universally followed in every circuit, and has twice been cited by this Court. See *Caperton v. A.T. Massey Coal*, 556 U.S. ___, 129 S. Ct. ___, 173 L. Ed. 2d 1208, 1225 (2009); *Cheney v. United States*, 541 U.S. 913, 924, 124 S. Ct. 1391, 158 L. Ed. 2d 225, 237 (2004).

The Court in *Liteky* did not, however, adjudge the standard to be utilized when the allegation of bias or prejudice against the trial judge is not raised by a party or by that judge, but is raised by an appellate court upon remanding the case. That question was left for another day. As the Court explains in *Liteky*:

> "Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. § 2106. That may permit a different standard, and there may be pragmatic reasons for a different standard. We do not say so – but merely say that the standards applied on remand are irrelevant to the question before us here."

510 U.S. at 554.

The day for consideration of that standard has come. The question whether the criteria of *Liteky* should be applicable to the removal of a trial judge under 28 U.S.C. § 2106 is squarely presented by this case. The Court should take this opportunity establish that the basis for recusal of a trial judge by an appellate panel upon remand is subject to the same standard as when recusal is sought by a litigant or considered by the trial judge him or herself.

In the last (of four) paragraphs in its July 17, 2009, Memorandum, the Ninth Circuit panel sets forth its finding that Judge Real "may have difficulty putting his previously expressed views aside, and remanding to a different district judge for sentencing would entail little duplication of labor." The Court of Appeals does not at that point cite any behavior or statement by Judge Real as a basis for this apparent finding of judicial disability. Instead, in the second

paragraph of its Memorandum, the Court of Appeals states:

> "In granting the motion to acquit, the district judge noted no problems with the identity of the attackers or with the evidence. Instead, the judge said 'it was at best an assault and battery, which should have been prosecuted by the state court.' But the choice of whether and how to charge a crime belongs to the executive, not the judiciary."

This commentary by Judge Real, coupled with his ruling on the Defendants' motions for acquittal, does not provide a basis for his recusal under the standard articulated in *Liteky*, where this Court holds:

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of trial that are critical or disapproving, of or even hostile to, counsel, the parties or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are

> expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display."

510 U.S. at 555-56 [italics in original].

Under *Liteky*, neither of the parties could have obtained the removal of Judge Real under these circumstances. In fact, he should not have removed himself, either. See *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 136, 140 (2nd Cir. 2003) ("a judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is"). Why, then, should it be appropriate for the Court of Appeals to remove him?

The Recusal of Judge Real by the Court of Appeals should be Overruled Because there is No Finding that Judge Real will have Substantial Difficulty Setting Aside any Extra-Judicial Opinions upon Remand for Sentencing

If, in fact, as *Liteky* suggests might be the case, there is a cognizably-different standard to be used for determining when a trial judge should be removed by an appellate court upon remand pursuant to 28 U.S.C. § 2106, that standard was articulated by the Second District in 1977:

> "[The principal factors ... in determining whether further proceedings should

> be conducted before a different judge are (1) whether the original judge would **reasonably be expected upon remand to have substantial difficulty** in putting out of his or her mind previously-expressed views or findings **determined to be erroneous or based on evidence that must be rejected,** (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

United States v. Robin, 553 F.2d 8, 10 (2nd Cir. 1977) [emphasis added].

In 1988, the Eleventh Circuit noted that the criteria set forth in *United States v. Robin* had been cited with approval in the Eleventh Circuit, and had been applied in the First and Ninth Circuits as well. *United States v. White*, 846 F.2d 678, 696 (11th Cir. 1988). The standard applied in the Sixth Circuit, although a not verbatim repetition of the *U.S. v. Robin* criteria, is essentially the same, including, crucially, that, to remove a judge, there must be a finding of a reasonable expectation that the judge will have substantial difficulty in putting aside his or her previously expressed views or findings. *Solomon v. United States*, 467 F.3d 928, 935 (6th Cir. 2006); *Sagan v. United States*, 342 F.3d 493, 501 (6th Cir. 2003).

Ironically, in its published opinions on the subject, the Ninth Circuit Court of Appeals has applied a more stringent version of the *U.S. v. Robin* test, requiring not only a reasonable expectation that there will be substantial difficulty putting aside an opinion, but also that the opinion must be found to be erroneous or based on evidence that must be rejected. In *United States v. Waknine*, 543 F.3d 546 (9th Cir. 2008), a case in which Judge Real was the trial judge, the defendant requested remand to a different judge for sentencing. The Court of Appeals denied that request, holding:

> "Absent unusual circumstances, resentencing is to be done by the original sentencing judge. When there are no allegations of bias, we consider the following factors in deciding whether unusual circumstances exist such that remand to a different judge is appropriate: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings **determined to be erroneous or based on evidence that must be rejected,** (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. The first two factors are of equal importance, and a finding of either one would support remand to a different judge."

543 F.3d at 559-560 [internal quotation marks omitted, emphasis added], citing *United States v. Working*, 287 F.3d 801, 809 (9th Cir. 2002); see also *United States v. Atondo-Santos*, 385 F.3d 1199, 1201 (9th Cir. 2004).

The Ninth Circuit seems to have crafted a new and different standard applicable to the removal of Judge Real in this case, however. In its Memorandum decision, the appellate panel explains that it fears Judge Real, "may have difficulty putting his previously expressed views aside." Obviously, "may have difficulty" is not the same as "reasonably expected to have substantial difficulty." However, the problem is greater than this semantic nicety. Leaving aside that the Court of Appeals apparently has based the recusal on judicial behavior and commentary that would not provide a basis for removal under *Liteky*, the Court of Appeals has also, in effect, done away with the requirement that there be a finding that there is a substantial likelihood that Judge Real will be unable to put aside his opinions so as to impose a lawful sentence.

The need for an appropriate basis to remove a judge upon remand is examined in *Corbell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). The D.C. Circuit utilizes the rationale of *Liteky* to analyze whether to order reassignment of the case to a different judge upon remand. The Court of Appeals reasons that special care is needed to be taken to avoid undermining the ability of district judges to perform their responsibilities, noting that it would make trial judges' task more difficult, "if district

judges had to worry that appellate courts would routinely review their decisions not just for legal error, but for bias as well." The Court of Appeals went on to write: "For this reason, and because except in the most unusual circumstances we trust judges to put their personal feelings aside, recusal must be limited to truly extraordinary cases where, as *Liteky* puts it, the judge's views have become so extreme as to display clear inability to render fair judgment." 455 F.3d at 332 [citations and internal quotation marks omitted].

There is simply nothing in the record of this case which would support a determination that Judge Real's "views have become so extreme as to display clear inability to render fair judgment." Cf. *United States v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989) (case remanded a third time, even though appellate court had twice determined on appeal that Judge Keller had imposed an inappropriate sentence); *United States v. Atondo-Santos*, 385 F.3d 1199 (9th Cir. 2004) (not until third appeal and remand involving same issues of sentencing did Court of Appeals order matter be handled by a different judge for sentencing).

The federal appellate courts have broad discretion to fashion remedies upon remand, including reassignment to a different district court judge, pursuant to 28 U.S.C. § 2106. However, section 2106 is not the only statutory provision which bears on the removal of a judge upon remand in a criminal case. Rule 25(b) of the *Federal Rules of Criminal Procedure*

provides, in relevant part: "After verdict or finding of guilt, any judge regularly sitting . . . may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability."

We will not presume to lecture the Court on constitutional law, but would note that Congress has the absolute authority to establish inferior federal courts, and to provide them whatever jurisdiction, whether limited, concurrent or exclusive, and to withhold jurisdiction from them, in the exact degrees and character which to Congress may seem proper for the public good. *Lockerty v. Phillips*, 319 U.S. 182, 87 L. Ed. 1339 (1942). The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial function. *Yankus v. U.S.*, 321 U.S. 414, 429, 88 L. Ed. 835 (1943). Such a specific proscription of the jurisdiction of the federal courts is found in Rule 25(b).

Judge Real was not absent, deceased or ill when the Court of Appeals ordered his recusal in this pending criminal case. As a result, the Circuit Court should have been required to find that Judge Real suffered from some "other disability" which prevents him from completing his duties as the trial judge in this matter. Such a disability can, of course, involve an inability to put aside previously expressed views. See *United States v. Jaramillo*, 745 F.2d 1245, 1248 (9th Cir. 1983), cert. denied, 471 U.S. 1066, 105 S. Ct. 2142, 85 L. Ed. 2d 499 (1985). However, "Rule 25(a)

provides a method for substituting judges when a presiding judge becomes ill or otherwise disabled during the course of a criminal trial. . . . The Rule, however, was not intended to serve as a means of substitution merely for the convenience of the presiding judge." *United States v. Lane*, 708 F.2d 1394, 1396 (9th Cir. 1983).

There is nothing in the facts or circumstances of this case demonstrating that Judge Real can reasonably be expected to have substantial difficulty in putting aside his apparently-low opinion of the government's case in crafting an appropriate sentence for Robert McGowan. What there is, however, is a long history between Judge Real and the Ninth Circuit. Apparently, Judge Real is known to have strong opinions about matters such as sentencing. See *United States v. Menyweather*, 447 F.3d 625, 642 (9th Cir. 2006) (dissent of Judge Kleinfeld). The Ninth Circuit has removed him on remand in other criminal cases, such as *United States v. Murillo*, 548 F.3d 1256 (9th Cir. 2008), the published opinion cited by the appellate panel below as authority for the removal of Judge Real in this case. See also *Living Designs, Inc. v. E.I. DuPont De Nemours*, 431 F.3d 353, 373 (9th Cir. 2005) ("Although we do not question the impartiality of [Judge Real], there are some unusual factors that indicate to us that a reassignment is advisable to preserve the appearance of justice."); *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1165-66 (9th Cir. 2007) ("we conclude that if this case were before him [Judge

Real] would have substantial difficulty in putting his previously expressed views out of his mind.")

There is nothing that has occurred in this case supporting the conclusion that Judge Real would have been unable to craft a legal and appropriate sentence upon remand. Instead, it appears that, over many years and a number of cases, the Court of Appeals has developed an opinion that Judge Real is not to be trusted to keep his personal, extra-judicial views from clouding his judgment. The appellate panel thinks he "may" have such difficulty. However, this is not the correct standard to apply to remove a trial judge in a pending criminal case.

The criteria for removal of a judge upon remand set forth in *United States v. Robin*, *supra*, includes, in addition to the first basis for recusal, which is partiality, a second, equally-important basis for recusal, which is the preservation of the appearance of justice. In this case, the removal of Judge Real, who presided over the jury trial below will harm, not help, the perception of justice regarding the prosecution of Robert McGowan.

McGowan, a prison guard, has been found guilty of assaulting two inmates. An experienced federal judge has ordered his acquittal, making disparaging comments about the prosecution's case in the process. The appellate court is quite familiar with this judge, and is apparently afraid that he is likely to be too lenient to the defendant in sentencing. So, the

appellate court has ordered the case assigned to a different judge for sentencing.

We wish to cast no aspersion on District Court Judge Otis D. Wright, II, before whom this matter is now pending. However, how can Judge Wright be expected to exercise his unfettered discretion, in light of the fact that the Court of Appeals for the Ninth Circuit has ordered that this case be assigned to a different judge to ensure the imposition of a sentence unlike that which Judge Manuel Real might impose? This is not the appearance of justice. This is the appearance of forum shopping, carried on by an appellate panel rather than a litigant, and this Court should grant the prayed-for Petition so as to clarify and ensure that such a perversion of justice is not to be permitted under the law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

DENNIS RIORDAN*
*Counsel of Record
RIORDAN & HORGAN
523 Octavia Street
San Francisco, California 94102
(414) 431-3471

RUSSELL J. COLE
PAUL R. DEPASQUALE
DEPASQUALE & COLE
523 West Sixth Street,
Suite 601
Los Angeles, California 90014
(213) 629-3550

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT MCGOWAN, Defendant-Appellee.	No. 07-50552 D.C. No. CR-07-00113-R MEMORANDUM* (Filed Jul. 17, 2009)

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued January 14, 2009 Submitted July 15, 2009
Pasadena, California

Before: KOZINSKI, Chief Judge, TROTT and KLEINFELD, Circuit Judges.

A jury convicted Correctional Officer Robert McGowan of assaulting two inmates under color of law, in violation of the inmates' Eighth Amendment rights. The district court granted a Fed. R. Crim. P. 29 motion for acquittal, and the government appeals. We reverse and remand for sentencing on counts 2 and 3 of the First Superseding Indictment.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

In granting the motion to acquit, the district judge noted no problems with the identity of the attackers or with the evidence. Instead, the judge said "it was at best an assault and battery, which should have been prosecuted by the state court." But the choice of whether and how to charge a crime belongs to the executive, not the judiciary. *See Wayte v. United States*, 470 U.S. 598, 607 (1985).

Viewing the evidence in the light most favorable to the prosecution, Robert McGowan used force against two inmates for the sole purpose of causing them harm. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

The district judge may have difficulty putting his previously expressed views aside, and remanding to a different district judge for sentencing would entail little duplication of labor. *See, e.g., United States v. Murillo*, 548 F.3d 1256, 1257 (9th Cir. 2008) (citing *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165-66 (9th Cir. 2007)).

Reversed. Remanded for assignment to a different district judge for sentencing and any other proceedings.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT MCGOWAN, Defendant-Appellee.	No. 07-50552 D.C. No. 2:07-cr-00113-R-1 Central District of California, Los Angeles **MANDATE** (Filed Sep. 2, 2009)

The judgment of this Court, entered 7/17/2009, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/

By: Theresa Benitez
Deputy Clerk

App. 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

– – –

THE HONORABLE MANUEL L. REAL,
JUDGE PRESIDING

United States of America, Plaintiff, vs. Robert McGowan, Thomas Ramos, and Hector Flores, Defendants.	)	Case No. CR 07-113(A)-R

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, November 26, 2007

Pamela A. Seijas, CSR, FCRR
Official Reporter
Roybal Federal Building
255 East Temple Street
Room 181-I
Los Angeles, California 90012
(213) 687-0446

[2] APPEARANCES:

FOR THE GOVERNMENT:	OFFICE OF THE UNITED STATES ATTORNEY BY: LAWRENCE MIDDLETON ASSISTANT UNITED STATES ATTORNEY TAMMY SPERTUS ASSISTANT UNITED STATES ATTORNEY 312 N. SPRING STREET LOS ANGELES, CA 90012
FOR DEFENDANT ROBERT McGOWAN:	DePASQUALE & COLE BY: PAUL R. DePASQUALE 523 W. SIXTH STREET SUITE 1228 LOS ANGELES, CA 90014
FOR DEFENDANT THOMAS RAMOS:	GOYETTE & ASSOCIATES, INC. BY: PAUL Q. GOYETTE 11344 COLOMA ROAD SUITE 145 GOLD RIVER, CA 95670
FOR DEFENDANT HECTOR FLORES:	JOEL LEVINE 695 TOWN CENTER DRIVE SUITE 875 COSTA MESA, CA 92626

[3] Los Angeles, California, Monday, November 26, 2007

2:02 p.m.

-oOo-

THE CLERK: Item No. 16, CR-07-113(A)-R, *United States of America vs. Robert McGowan, et al.*

Counsel, your appearances, please.

MS. SPERTUS: Good afternoon, Your Honor. Tammy Spertus and Lawrence Middleton for the United States. With us at counsel table is Special Agent Hanamare with the Federal Bureau of Investigation.

MR. DePASQUALE: Paul DePasquale with defendant McGowan, who is out of custody.

MR. GOYETTE: Paul Goyette appearing for defendant Thomas Ramos, who is present with us this afternoon, also out of custody.

MR. LEVINE: Good afternoon, Your Honor. Joel Levine appearing on behalf of Hector Flores, who is present.

THE COURT: All right. Anything to add to the documents which should have been filed in this matter?

MS. SPERTUS: Not from the Government, Your Honor, at this point.

THE COURT: From the defendant McGowan?

MR. DePASQUALE: Very briefly, Your Honor, if I may. As to the sufficiency of the evidence on the Waller assault, we would leave that point, and as to whether the evidence satisfies [4] the burden of proof in light most favorable to the prosecution, we would submit that matter to the Court's discretion.

On the Villa assault, we suggest that Mr. Villa's specific description and characterization of the perpetrator of an assault on him, Villa, actually precisely eliminates defendant McGowan as the perpetrator of such assault.

And on the conspiracy to obstruct justice charge, what the evidence consists of in the light most favorable to the prosecution is that the defendant allegedly protested his innocence, indicated that he would answer questions if asked, and on the date of the underlying incident, walked away from a group of nervous officers. There is no evidence of any overt act or statement, proposition or indication of intent in furtherance of such a conspiracy. And with that we thank you and submit the matter.

THE COURT: What was the conspiracy?

MR. DePASQUALE: To obstruct justice by – we're not sure.

THE COURT: Justice of what?

MR. DePASQUALE: Bringing this matter, I assume – I don't want to assume the Government's case. I assume that the justice would have been to bring this evidence forth, which McGowan indicated

he would be willing and able to do upon being asked. That he would give evidence, if evidence were sought from him. But there is no evidence that he – he tried –

[5] THE COURT: The charge here is the conspiracy to obstruct the justice of a Federal Grand Jury. I want to know where the obstruction of the Federal Grand Jury took place –

MR. DePASQUALE: We –

THE COURT: – with these four defendants – with the three defendants.

MR. DePASQUALE: We can't answer. I believe that's a question for the Government.

MS. SPERTUS: Your Honor –

THE COURT: Where did the conspiracy take place to obstruct the justice of the Federal Grand Jury?

MS. SPERTUS: Your Honor, the evidence that was presented at trial with respect to each of these defendants, including defendant McGowan, was that from the very beginning of right after this incident, there were attempts made by each of the defendants to collaborate in order to cover up and to not allow the truth of what had actually happened; that is, the assault of these inmates comes out –

THE COURT: But they weren't called to the Grand Jury to cover up, and nothing that I know

of, any evidence was ever presented to the Grand Jury of this cover-up. To the Federal Grand Jury.

MS. SPERTUS: Your Honor –

THE COURT: The best that the Government proved was maybe, maybe, a conspiracy, a state conspiracy, but not a [6] federal conspiracy. At best. At best.

MS. SPERTUS: Your Honor, the fact that – as the Court instructed the jury in the jury instructions after the trial a Federal Grand Jury proceeding, that being the Grand Jury investigation, did not have to be pending at the time that the conspiracy began. The –

THE COURT: But nothing was presented to the Federal Grand Jury. Nothing was presented to the Grand Jury about this, quote, conspiracy to obstruct justice.

MS. SPERTUS: Your Honor, the Grand Jury heard evidence that – from Officer Freeman that he had initially lied and submitted a memo lying about what had happened in the incident.

THE COURT: That's what Freeman did, but he didn't – there was no question of conspiracy. At all.

MS. SPERTUS: Well, with respect, for instance, to defendant Ramos, the Grand Jury evaluated evidence that Ramos submitted a memorandum that was, in fact, a lie.

THE COURT: Oh, memorandum to whom? Not to the Federal Grand Jury or to any federal agent.

MS. SPERTUS: No. To his supervisor.

THE COURT: It may have been a state violation, but not a federal violation.

MS. SPERTUS: Well, the – there – the defendants were aware that this could be investigated federally.

[7] THE COURT: There's no evidence of that. There is absolutely no evidence of that. Absolutely no evidence. Not one word of evidence that any of these three men ever heard about a Federal Grand Jury investigation. Until they were indicted.

MS. SPERTUS: With respect to the defendant Flores, he was certainly aware of the Grand Jury investigation in that he had testified before it and then following that testimony, he had –

THE COURT: There is no evidence that he conspired with these men to give that false testimony.

MS. SPERTUS: Well, Your Honor –

THE COURT: He gave it when he was being chosen as a witness for the Government.

MS. SPERTUS: Yes, but the fact is that the evidence is circumstantial but that there was collaboration with the other defendants to cover up. For instance –

THE COURT: Not at the Federal Grand Jury, counsel. Not at the Federal Grand Jury. Not a federal offense.

MS. SPERTUS: May I just have a moment, Your Honor?

THE COURT: That's what you charged.

MS. SPERTUS: Your Honor, if you take a look at, for instance, just defendant Flores, defendant Flores knew there was a Federal Grand Jury investigation ongoing. He, in fact, testified before –

[8] THE COURT: He didn't know it until two years when he was called to the Grand Jury – or was investigated – or talked to a federal agent, two years after the events involved here.

MS. SPERTUS: At that point, he already had submitted a memo in which he himself later admitted that he had lied. That memo was, in fact, incredibly similar to defendant Ramos' memo indicating that it –

THE COURT: Ramos' memo was not submitted to the Federal Grand Jury.

MS. SPERTUS: Your Honor, the memos need not be submitted to the Federal Grand Jury, but what they indicate is they are – I am just referring to them because they are simply circumstantial evidence of the fact that these officers collaborated to obstruct an investigation.

THE COURT: Anything further?

MR. DePASQUALE: There isn't even an allegation of a false statement of any kind by McGowan. That's all. I would submit. Thank you, Your Honor.

THE COURT: Defendant Ramos?

MR. GOYETTE: I will submit it on the pleadings.

THE COURT: Flores?

MR. LEVINE: Submit it.

THE COURT: The motion on the conspiracy, Count 1 is granted. The matter is dismissed. Not only on the basis of the – of what is a faulty allegation of a federal crime, but [9] there is no evidence – we had no evidence of a federal crime.

We will take up the McGowan motions having to do with Counts 2 and 3. Anything to add to those?

MR. DePASQUALE: No, Your Honor.

MS. SPERTUS: We will submit on those, Your Honor.

THE COURT: Okay. I find that there is no evidence of any intent of Mr. McGowan to deprive CV of any rights secured or protected by the Constitution and the laws of the United States, not to be deprived of liberty without due process of law, which includes the right not to have cruel and unusual punishment inflicted upon him. The actions of Mr. McGowan, at least there is no evidence that it is, quote, cruel and

unusual punishment. It appears that at best, at best it's a simple state assault and battery and should have been prosecuted by the state court as an assault and battery.

Any evidence to the contrary?

Silence of the Government. The motion is granted –

MS. SPERTUS: Your Honor, I am sorry. If I could address that. Your Honor, the fact that this excessive force that was used – well, the evidence – there were two basic issues for the Government to establish at trial with respect to inmate Carlos Villa and the defendant McGowan's handling of Inmate Villa. That was whether, in fact, Inmate Villa was assaulted and who he was assaulted by. Because certainly defendant McGowan was acting under color of law at that time. [10] And certainly the evidence is that he acted willfully.

The evidence established that McGowan himself who puts himself there, stepped up to the van, that his – he grabbed the inmate, Villa, out of the van and threw him headfirst to the pavement. Officer Freeman testified that he saw Officer McGowan's hands on Inmate Villa. That he saw Inmate Villa out of the corner of his eye fall to the ground. He didn't know it was Inmate Villa at the time but later learned that the inmate who suffered injury to his head, to his chin, was, in fact, the inmate he had seen thrown out of the van by Officer McGowan.

This kind of use of force is, in fact, just that –

THE COURT: The injury here doesn't seem to be cruel and unusual punishment. He had a laceration on the chin and that's all.

MS. SPERTUS: Your Honor –

THE COURT: And that's all.

MS. SPERTUS: Your Honor, the nature of the injury is not what makes it cruel and unusual. It's the action –

THE COURT: That makes it a simple assault and battery, counsel. It doesn't make it cruel and unusual punishment.

MS. SPERTUS: Your Honor, throwing somebody headfirst to the pavement could – the inmate could have easily sustained far more serious injuries. The fact that he ended up with what the Court is describing as a simple assault is really neither [11] here nor there in terms of determining the defendant's intent to willfully deprive that inmate of a constitutional right.

THE COURT: All right. Anything further?

MS. SPERTUS: No, Your Honor.

MR. DePASQUALE: No, Your Honor.

THE COURT: The motion as to Mr. McGowan as to 2 and 3 is granted. The Court finds that, at least as the 13th juror, it was at best an

assault and battery, which should have been prosecuted by the state court and can, I assume, still be prosecuted by the state court, by the State District Attorney – I guess it's Los Angeles County, if they're interested in what the situation is.

All right. If you will prepare the orders, counsel.

MR. LEVINE: Will the Court also include in the order exoneration of the bond?

THE COURT: Yes. The bonds will be exonerated.

MR. DePASQUALE: Thank you, Your Honor.

THE COURT: Don't thank me for any rulings that I have to make.

(Proceedings adjourned at 2:16 p.m.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT MCGOWAN, Defendant-Appellee.	No. 07-50552 D.C. No. 2:07-cr-00113-R-1 Central District of California, Los Angeles ORDER (Filed Aug. 25, 2009)

Before: KOZINSKI, Chief Judge, TROTT and KLEINFELD, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Chief Judge Kozinski and Judge Kleinfeld have voted to deny the petition for rehearing en banc, and Judge Trott has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

No. 09-753

In the Supreme Court of the United States

ROBERT MCGOWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
MARA L. GROSS
LISA J. STARK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, after reversing the district court's grant of petitioner's motion for a judgment of acquittal, the court of appeals exceeded its supervisory authority when it reassigned the case to another district court judge for sentencing on remand

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In the Supreme Court of the United States

No 09-753

ROBERT MCGOWAN, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet App 1-2) is not published in the *Federal Reporter* but is reprinted in 338 Fed Appx 662

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009 A petition for rehearing was denied on August 25, 2009 (Pet App 16) On November 19, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 23, 2009, and the petition was filed on that date The jurisdiction of this Court is invoked under 28 U S C 1254(1)

STATEMENT

Following a jury trial in the United States District Court for the Central District of California petitioner was convicted of two counts of deprivation of rights under color of law, in violation of 18 U S C 242 (Counts 2 and 3), and one count of conspiracy to obstruct justice, in violation of 18 U S C 371 (Count 1) The district court granted petitioner s motion for a judgment of acquittal on all counts The government appealed, challenging the district court's order as to Counts 2 and 3 Gov't C A Br 2 4 The court of appeals reversed and directed that the case be assigned to a different district court judge for sentencing Pet App 1-2

1 On May 9, 2002, several inmates of the California Institute for Men at Chino (Chino) were transferred to Chino's administrative segregation unit Most of the inmates were being transferred because of their suspected participation in an assault on a correctional officer earlier that day Petitioner, then a correctional officer at Chino, and other officers met the transport van upon arrival at the facility Petitioner pulled inmates Carlos Villa and Joseph Waller out of the van, threw them onto the ground, repeatedly kicked and punched them, and smashed their heads against the wall or stair rails Both inmates were shackled in handcuffs, waist and leg chains during the attack And both inmates suffered multiple cuts and abrasions to their faces Gov't C A Br 4 9

A federal grand jury returned a superseding indictment charging petitioner with two counts of deprivation of rights under color of law, in violation of 18 U S C 242 Specifically, petitioner was charged with depriving inmate Villa of his right "not to be deprived of liberty without due process of law, including the right not to

have cruel and unusual punishment inflicted upon him" (Count 2), and with depriving inmate Waller of the same (Count 3) Gov't C A E R 720-721 Petitioner and two co defendants were also charged with conspiracy to obstruct justice in violation of 18 U S C 371 (Count 1) Gov't C A E R 715-719

Petitioner moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) [1] With respect to Count 2, petitioner argued that inmate Villa described his attacker as having certain characteristics that petitioner did not (*e g*, describing his attacker as a Mexican-American) On Count 3, petitioner claimed that inmate Waller was not credible because he had initially denied that any assault occurred In response, the government argued that there was ample evidence to support the jury verdict inmate Waller identified petitioner as one of his attackers, inmate Villa was assaulted by two officers (only one of whom he thought was Mexican-American), one of the other officers saw petitioner grab inmate Villa and petitioner admitted that he physically removed the first three or four inmates from the van—inmate Villa was second and Waller was third Gov t C A Br 13 14

At the hearing on petitioner's motion, the district court focused primarily on the conspiracy to obstruct justice charge Pet App 6-12 When the judge turned to Counts 2 and 3, he did not question whether the attacks occurred or whether petitioner was the attacker—the grounds for acquittal raised by petitioner Rather, the court concluded that the attacks did not

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[1] Petitioner and his co-defendants also moved for a judgment of acquittal on Count 1 The district court granted that motion and the government did not appeal that ruling Gov t C A Br 3-4 Accordingly the discussion that follows focuses on Counts 2 and 3

amount to cruel and unusual punishment as charged because they were 'at best * * * a simple state assault and battery and should have been prosecuted by the state court as an assault and battery." *Id.* at 13. The judge permitted only a brief response from the government, and interrupted on several occasions to state that because inmate Villa "had a laceration on the chin and that's all," it was not "cruel and unusual punishment,' and to reiterate that it was "a simple assault and battery." *Id.* at 14. The court then granted petitioner's motion for acquittal on both counts, finding that "at least as the 13th juror, it was at best an assault and battery, which should have been prosecuted by the state court and can, I assume, still be prosecuted by the state court, by the State District Attorney * * * if they're interested in what the situation is." *Id.* at 14-15.

2. The government appealed. In an unpublished opinion, the court of appeals reversed and remanded for sentencing on Counts 2 and 3. Pet. App. 1-2. The court observed that "[i]n granting the motion to acquit, the district judge noted no problems with the identity of the attackers or with the evidence," but rather relied on his view that "it was at best an assault and battery, which should have been prosecuted by the state court.' *Id.* at 2. But, the court explained, "the choice of whether and how to charge a crime belongs to the executive, not the judiciary." *Ibid.* Under the proper standard, "[v]iewing the evidence in the light most favorable to the prosecution," the court held that petitioner 'used force against two inmates for the sole purpose of causing them harm" and that "[w]hen prison officials[, like petitioner,] maliciously and sadistically use force to cause harm,' they "always violate[]" "contemporary standards

of decency" *Ibid.* (quoting *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992)).

After reversing the district court's grant of petitioner's motion for a judgment of acquittal, the court remanded and directed that the case be assigned to a different district judge for sentencing. Pet. App. 2. Relying on prior Ninth Circuit precedent, the court concluded that "[t]he district judge may have difficulty putting his previously expressed views aside, and remanding to a different district judge for sentencing would entail little duplication of labor." *Ibid.* (citing, *e.g.*, *United States* v. *Murillo*, 548 F.3d 1256, 1257 (9th Cir. 2008), and *Rhoades* v. *Avon Prods., Inc.*, 504 F.3d 1151, 1165-1166 (9th Cir. 2007)).

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals' decision to reassign his case to a different district judge for sentencing "departs from the accepted and usual course of judicial proceedings * * * and * * * is in conflict with decisions [of this Court] or other [c]ourts of [a]ppeals." The court of appeals' unpublished, interlocutory decision is a fact-bound application of well-established principles, and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. This case arises in an interlocutory posture and petitioner has made no showing of a need for immediate review. The court of appeals reversed an order granting petitioner's post-trial motion for a judgment of acquittal and remanded for sentencing. That sentencing has not yet occurred. See Pet. 5. Petitioner has not suggested, much less established, that assignment of his case to a different district judge for sentencing has caused him any immediate or irreparable harm. Following the dis-

trict court's final disposition of the case, petitioner will be able to raise his current claim, together with any other claims that may arise as a result of the additional proceedings on remand in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The interlocutory posture of this case "alone furnish[s] sufficient ground for the denial of" the petition here. *Hamilton Brown Shoe Co.* v *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), see *VMI* v *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

2. In any event, the court of appeals' decision was well within its supervisory powers and does not conflict with any decision of this Court or any other court of appeals.

a. Contrary to petitioner's suggestion (Pet. 6-9), the court of appeals' decision does not conflict with *Liteky* v *United States*, 510 U.S. 540 (1994).

Liteky involved 28 U.S.C. 455(a), which provides that a federal judge shall "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and presented the question whether recusal under that provision was subject to the "'extrajudicial source' doctrine." 510 U.S. at 541. This Court answered in the affirmative explaining, however, that the 'doctrine' was more of a *'factor'* suggesting that recusal is rarely appropriate when based on a judge's conduct during judicial proceedings. *Id.* at 554-555. As the Court observed, recusal *"may"* be appropriate if a judge's remarks during such proceedings "derive[] from an extra

judicial source,' and 'will' be warranted if they 'reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.'" *Id.* at 555.

As petitioner acknowledges (Pet. 9), however, the Court did not decide the standard to be applied before a court of appeals reassigns a case to a different judge on remand. The Court explained that a "[f]ederal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone [such as 28 U.S.C. 455], but on the appellate courts' statutory power to require such further proceedings to be had as may be just under the circumstances.'" *Liteky*, 510 U.S. at 554 (quoting 28 U.S.C. 2106). The Court noted that such cases "may permit a different standard, and there may be pragmatic reasons for a different standard," but found the proper inquiry in those distinct circumstances "irrelevant to the question before us." *Ibid.* Accordingly, the court of appeals' decision does not conflict with *Liteky*.

b. Petitioner's assertion (Pet. 9-17) that the court of appeals crafted and applied a new standard for reassignment upon remand that differs from the standard adopted by other courts of appeals, as well as by the Ninth Circuit itself, is equally without merit.

As petitioner concedes (Pet. 13), "[t]he federal appellate courts have broad discretion to fashion remedies upon remand, including reassignment to a different district court judge, pursuant to 28 U.S.C. § 2106." See 28 U.S.C. 2106 (providing that appellate courts may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"). In the absence of actual bias, the courts of appeals generally ask (1) "whether the original judge

would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,' (2) "whether reassignment is advisable to preserve the appearance of justice," and (3) 'whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." See *United States* v *Robin*, 553 F 2d 8, 10 (2d Cir 1977) (cited at Pet 9-10), see also *Cohesive Techs Inc* v *Waters Corp*, 543 F 3d 1351, 1375 (Fed Cir 2008) (applying First Circuit law), *United States* v *Lentz*, 383 F 3d 191, 221-222 (4th Cir 2004), cert denied, 544 U S 979 (2005), *Solomon* v *United States*, 467 F 3d 928 935 (6th Cir 2006) (cited at Pet 10), *Mitchell* v *Maynard*, 80 F 3d 1433, 1450 (10th Cir 1996), cf *United States* v *Heubel*, 864 F 2d 1104, 1112 (3d Cir 1989) (applying three factors), *United States* v *White*, 846 F 2d 678, 696 (11th Cir) (same), cert denied, 488 U S 984 (1988), *United States* v *Wolff*, 127 F 3d 84, 88 89 (D C Cir 1997) (same), cert denied, 524 U S 929 (1998), *In re DaimlerChrysler Corp*, 294 F 3d 697, 700 701 (5th Cir 2002) (suggesting that the Third, Eleventh, and District of Columbia Circuits apply a "more lenient test' and declining to choose which test to adopt)

Petitioner cites that standard approvingly and he acknowledges that the Ninth Circuit engages in the same three-factor inquiry See Pet 9 12 (citing *United States* v *Wahrine*, 543 F 3d 546, 559-560 (2008), and *United States* v *Alondo Santos*, 385 F 3d 1199, 1201 (2004)) see also, *e g*, *United States* v *Ressam* 593 F 3d 1095, 1131-1132 (2010), *United States* v *Paul*, 561 F 3d 970, 975 (2009), *Rhoades* v *Avon Prods*, *Inc*, 504 F 3d 1151, 1165 (2007) Petitioner argues (Pet 12) however,

that in this case the court of appeals crafted a new test That is incorrect

In ordering reassignment on remand, the court of appeals cited, as an example, one of the many Ninth Circuit cases setting forth and applying the well-established standard Pet App 2 In *Rhoades*, 504 F 3d at 1165 (cited at Pet App 2), the court explained that remand to a different district judge is appropriate "if there is a demonstration of personal bias, or if "unusual circumstances" are deemed to exist after considering the three factors outlined above *Ibid* (quoting *United Nat'l Ins Co* v *R&D Latex Corp*, 141 F 3d 916, 920 (9th Cir 1998)) There is no reason to think that the court of appeals below "crafted a new and different standard' (Pet 12) at the same time it cited and relied on *Rhoades*

Nor does the court's explanation that it was reassigning the case because the trial judge 'may have difficulty putting his previously expressed views aside" signify a departure from the governing standard Pet App 2 The court cited the applicable case law and, in line with the approach of other courts, used shorthand when referencing the relevant standard See *e g*, *Research Corp Techs Inc* v *Microsoft Corp*, 536 F 3d 1247, 1255 (Fed Cir 2008) (reassigning case because judge's 'previously-expressed views or findings may make it difficult * * * to approach a remanded case with an open mind"), *Shcherbakovskiy* v *Da Capo Al Fine, Ltd.* 490 F 3d 130, 142 (2d Cir 2007) (reassigning case because it was "questionable" whether judge could be "objective') *Cullen* v *United States*, 194 F 3d 401 408 (2d Cir 1999) (noting that reassignment would be appropriate 'in recognition of the 'difficulty' that a judge might have 'putting aside his previously expressed views")

(quoting *United States* v *Campo*, 140 F 3d 415, 420 (2d Cir 1998)) At most, petitioner asserts an intracircuit conflict that would not warrant this Court's review See *Wisniewski* v *United States*, 353 U S 901, 902 (1957) (per curiam)

3 The court of appeals properly applied the well-established standard to the facts of this case and, in any event, any factbound error would not warrant this Court's review

The limited district court record reveals that the district judge granted petitioner's post-trial motion for a judgment of acquittal on the civil rights counts for reasons that were not raised by petitioner and to which the government had minimal opportunity to respond See Pet App 12-14 The judge repeatedly emphasized that the jury's guilty verdict could not stand because petitioner's conduct should never have been considered a federal offense According to the district court, the government had "at best [proved] an assault and battery which should have been prosecuted by the state court *Id* at 14-15, *id* at 14 (reiterating that this was "a simple assault and battery"), *id* at 13 (stating again, that it was "at best * * * a simple state assault and battery and should have been prosecuted by the state court as an assault and battery') But that reasoning was based on a clearly erroneous understanding of the law, as the court of appeals explained (*id* at 2) Given the judge's refusal to recognize that petitioner's conduct was in fact criminal under federal law, his failure to correctly apply the governing law, and his unwillingness to afford the government an adequate opportunity to respond to this newly raised basis for acquittal, reassignment on re-

mand was well within the court of appeals supervisory authority [4]

The grounds for reassignment in this case are similar to those relied on by the court of appeals in *Rhoades* (cited at Pet App 2) The *Rhoades* court determined that reassignment was warranted because the district judge granted a motion to dismiss without affording the other side an opportunity to respond, and based on a belief that the case was 'brought for an improper motive," of which there was no record evidence, and on an erroneous understanding of the law 504 F 3d at 1165 1166 (citation omitted), see also *Shcherbakovskiy* 490 F 3d at 142 (reassignment following reversal of dismissal order and entry of default judgment even though there was ' little doubt that the district judge would follow [the court's] instructions as to the law on remand') *United States* v *Andrews*, 390 F 3d 840, 851 (5th Cir 2004) (reassignment because judge ' breached the barrier between the rule of law and exercise of personal caprice"), *Mitchell* 80 F 3d at 1448-1450 (reassignment following reversal of entry of judgment as a matter of law where, *inter alia*, judge previously expressed views that the plaintiff's ' Eighth Amendment claims are frivolous, a waste of the jury's time and as a matter of law fail to state a claim') *Hermes Automation Tech , Inc* v *Hyundai Elecs Indus Co* , 915 F 2d 739, 752 (1st Cir 1990) (reassignment following reversal of dismissal or

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[4] Petitioner also relies on Federal Rule of Criminal Procedure 25(b) to argue that reassignment is never proper unless the trial judge is unable to perform his duties 'because of absence death sickness or other disability ' Pet 13-15 (quoting Fed R Crim P 25(b)) But petitioner concedes that an inability to put aside previously expressed views would qualify as an other disability (Pet 14) which is what the court of appeals found

der where judge had "strong criticism of plaintiffs' claims as not only frivolous, but verging on fraudulent," even though court had "no doubt that the original district judge could handle plaintiffs' claims with unquestionable fairness"), *United States* v *Torkington*, 874 F 2d 1441, 1446 1147 (11th Cir 1989) (reassignment following reversal of entry of judgment of acquittal where, among other things, the judge "questioned the wisdom of the substantive law" and challenged the government's decision to prosecute")

Any asserted factbound error in the court s exercise of its supervisory powers does not warrant this Court s review

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted

ELENA KAGAN
Solicitor General
THOMAS E PEREZ
Assistant Attorney General
MARK L GROSS
LISA J STARK
Attorneys

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